Great weight should be attached to the fact that he saw and heard the witnesses, but it is clear that the identification parade was not as free from doubt as it should have been and that possibly the clothing of the accused on that occasion persuaded the complainants that accused was the man to be pointed out.

As against this there are two witnesses for the defence who definitely place accused in a position during the crucial times where he could not have been the guilty person. These witnesses were not in any way shaken in cross-examination.

The *onus* of proof placed on the accused in a criminal case is far less than that required from the prosecution; it is merely incumbent on him to put up an explanation of his actions which is consistent with innocence, and the duty of the Court is, if satisfied that such is the case, to consider if it *might* reasonably be true, and, if so, how it affects the prosecution story. Viewed in that light I am of opinion that there can be no doubt that the accused's story, backed by witnesses there is no reason to disbelieve, might reasonably be true. If that is so, it follows that the prosecution story cannot be accepted and the benefit of the doubt must be given to the accused and the issue be decided in his favour.

Accordingly the conviction in both cases must be set aside and the sentence quashed and the accused acquitted on both charges, and I so order.

Conviction Set Aside
Accused Acquitted.

CHIN HON & 2 ORS. v. PUBLIC PROSECUTOR.

[C. A. (Pretheroe, Ag. C.J., M.U.; Murray-Aynsley, C.J. (Singapore) and Evans, J.) June 12, 1948]
[K.L. — Cr. App. No. 132 of 1947]

Penal Code, s. 34 — Common intention.

To invoke the aid of s. 34 of the Penal Code successfully it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all: if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act was done by him alone.

*Cases referred to**:—

(1) *Fazoo Khan & Ors. v. Jatoo Khan & anor.*, A.I.R. (1931) Cal. 643.

(2) *Mahbub Shah v. Emperor*, A.I.R. (1945) P.C. 118.

COURT OF APPEAL (CRIMINAL).

F. J. Woodward for the 1st Appellant.

P. J. D. Regester for 2nd Appellant.

T. K. Sen for the 3rd Appellant.

J. V. M. Shield for Respondent.

The judgment of the Court of Appeal was delivered by :—

Pretheroe, Ag. C. J. : — At the conclusion of this appeal the Court announced that each of the appeals was dismissed and that the Court would state in writing its reasons in so far as one of the grounds of appeal was concerned. That ground which was submitted by Mr. Woodward, and adopted by counsel for the other two appellants, read as follows :—

> The learned trial Judge should have directed the Assessors that they should arrive at a finding of fact as to which of the three accused took what part if any in furtherance of the common intention to commit the offence with which they are jointly charged before the Court could record a conviction against the first accused or any of the accused for the offence with which they are jointly charged read with section 34 of the Penal Code (Cap. 45). The learned trial Judge did not give this direction and no such finding was made by the Assessors. The conviction is therefore bad in law.

This submission was based on the following comment by *Ratanlal* at page 72 of the 16th edition of his Law of Crimes :—

> Before any accused can be convicted of an offence read with this section (i.e. section 34) the Court must arrive at a finding as to which of the accused took what part, if any, in furtherance of the common intention. A conviction without such a finding is illegal.

It is clear that this comment cannot mean precisely what it says, for at pages 64 and 65 of the same volume the following comment appears :—

> This section (i.e. section 34) is framed to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them. The reason why all are deemed guilty in such cases is that the presence of accomplices gives encouragement, and protection to the person actually committing the act.

The first of the two comments quoted above was based on the head-note to *Fazoo Khan & Others v. Jatoo Khan & another*[1], which reads as follows :—

> Penal Code section 34. Participation in action to commit offence with common intention is essential element and Court must arrive at finding as to part played by each individual accused in furtherance of common intention.....a conviction without such finding is illegal.

There is nothing in the judgment in that case to support that part of the head-note which requires a Court to arrive at a finding as to the part played by each individual accused. The correct position is made clear by the decision of the Privy Council in *Mahbub Shah v. Emperor*[2]. The relevant portion of the

* Reference may also be made to Rex v. Banka (1936) M.L.J. 66. Ed. M.L.J.

head-note to the report of that appeal reads as follows :—

> Common intention within the meaning of section 34 implies a pre-arranged plan. To convict the accused of an offence applying section 34 it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan.

And in the judgment the following observations appear :—

> To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all: if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone.

In this appeal there was abundant evidence to prove that the three appellants had made a pre-arranged plan and that this plan was duly carried out as pre-arranged. Apart from this, the three appellants were all present when the act was carried out, and there was evidence which the Assessors could have accepted to prove that each appellant took an active part in the murder.

For these reasons the appeal of each appellant was dismissed.

Appeal Dismissed.

PUBLIC PROSECUTOR v. MARIMUTHU S/O AMAYAPAN

[App. Crim. Juris. (Russell, J.) June 14, 1948]
[K.L. — Cr. App. No. 28 of 1948]

Minor Offences Enactment (Cap. 46) S. 35 (i), (ii), (iii), (iv) — Defence — Meaning of "Possession".

In this case an Inspector found in the house of the Respondent a number of articles which might reasonably be suspected of being stolen but at the conclusion of the case for the prosecution the Magistrate acquitted and discharged the Respondent without calling for his defence relying on **Regina v. Kwek Chang Seng**[1] which case was quoted with approval in the case of **Yee Ngok v. Public Prosecutor**[2].

Held, that Sub-sec. (iv) of S. 35 of the Minor Offences Enactment was not brought to the notice of the learned Judge in the case of **Yee Ngok v. Public Prosecutor**[2]. Sub-sec. (iv) of S. 35 definitely states that the word "possession" in sub-sec. (i), (ii) and (iii) includes "possession in a house, building, ship, vessel, boat or other place as well as possession in a public road or place".

Cases referred to :—

(1) *Regina v. Kwek Chang Seng*, 6 S.S.L.R. p. 35 (Dissented).

(2) *Yee Ngok v. Public Prosecutor*, (1947) M.L.J. p. 136 (Dissented).

MAGISTRATE'S CRIMINAL APPEAL.

F. G. Cooke, D.P.P., for Public Prosecutor.

Respondent in person.

Russell, J. : — This is an appeal by the Public Prosecutor against a decision of the Magistrate at Kuala Lumpur who acquitted and discharged one Marimuthu s/o Amayapan of an offence punishable under Section 35 (i) of the Minor Offences Enactment (Cap. 46) without calling upon him for his defence.

In the house of the Respondent an Inspector of Police found a number of articles which which might reasonably be suspected of being stolen, and at the conclusion of the case for the prosecution the Magistrate refused to call upon the Respondent for his defence on the ground that a charge under this section can only be maintained if the articles are found in the possession of an accused in a street or public place. He relied upon the case of *Regina v. Kwek Chang Seng*[1] which case was quoted with approval in the case of *Yee Ngok v. Public Prosecutor*[2].

The former case was decided before the enactment of the Minor Offences Enactment in its present form, and in my opinion can no longer be relied upon as section 35 (iv) definitely states that the word "possession" in sub-sections (i), (ii) and (iii) includes "possession in a house, building, ship, vessel, boat or other place as well as possession in a public road or place."

I must add that the learned Federal Counsel who appeared for the Appellant in this case pointed out that sub-section (iv) of Section 35 was not brought to the notice of the learned Judge in the case of *Yee Ngok v. Public Prosecutor*[2].

I accordingly set aside the order of acquittal and order a new trial before another Magistrate.

Retrial Ordered.

PUBLIC PROSECUTOR v. GINDER SINGH & CHET SINGH.

[App. Crim. Juris. (Callow, J.) June 17, 1948]
[Seremban — Crim. App. No. 8 of 1948]

Motor Vehicles Commercial Use Regulations — Motor Vehicles Commercial Use (Amendment) Regulations 1948, Reg. 7 — Question of mens rea and absolute prohibition against overloading — Responsibility of owner of motor vehicle — Criminal Procedure Code, Ss. 153, 422.

The facts of the case are that on the 6th of February 1948 a lorry driven by one Nagar Singh was found to be overloaded. The driver was proceeded against and very heavily fined. The overloading was the result of directions given by the Manager of an Estate, which in turn resulted from a lorry breakdown. The respondent had no direct connection with the overloading at